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# **The Law is What the Arbitrator Had For Breakfast: How Income, Reputation, Justice, and Reprimand Act as Determinants of Arbitrator Behaviour\***

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*Abstract:* This paper examines the salient incentives and constraints that the current socio-legal system of arbitration places on arbitrators. In doing so, it mirrors the main steps taken by classical law and economics studies on judicial behaviour. It takes the main types of incentives and constraints identified in these studies and applies them to the behaviour of arbitrators. The rationale of the current study is that arbitrators, like everyone else, are maximisers of their own utility. The pursuit of that maximisation influences how they decide cases. The components of their utility are determinants of their behaviour. If we better comprehend these determinants - what influences and motivates the behaviour of arbitrators - we can better understand arbitration, and the law that applies and should apply to it, and the law created by it.

## **Introduction**

In arbitration, the law is what the arbitrator says it is – against the background, granted, of what courts whisper at the seat of the arbitration and the places of enforcement. And as the view classically attributed to legal realism has it, what the judge (or arbitrator) says depends on what he had for breakfast.<sup>1</sup> So, on this view, the law in arbitration depends on what the arbitrator had for breakfast. This, in substance, is the subject of this essay.

No, it does not mean that we will entertain profound discussions on the relative merits of sunny-side up vs. poached, pancakes vs. croissants, tea with milk vs. cappuccino, or even the critically important debate over full English vs. full Irish breakfast. (Sorry if you are already hungry.) What it does mean is that we will take the idea seriously that if we better comprehend what influences and motivates the behaviour of arbitrators, we can better understand arbitration, and the law that applies and should apply to it, and the law created by it.

The point is simple: as Brian Leiter puts it, describing a central line of thought in legal realism, “[w]hat causes judges to decide as they do” – and the same applies to arbitrators – “is not legal rules, but a sense of what would be fair on the facts of the case at hand”.<sup>2</sup> For evidence, he points us to statements of judges such as this: “the vital, motivating impulse for the decision is an intuitive sense of what is right and wrong for that cause.”<sup>3</sup>

Now what, exactly, is “that cause”, in the preceding sentence, which is to be advanced by the decision? Canons of the law and economics approach would tell us that it is not the human context *per se* of

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\* Particular thanks for useful comments go to Andrea Bianchi and Fuad Zarbiyev. Many occasional discussions with the late Pierre Lalive informed the narrative of this essay.

<sup>1</sup> This is merely jurisprudential lore, but the metaphor is useful in making our point. See Brian Leiter, *Naturalizing Jurisprudence* (OUP 2007) 62.

<sup>2</sup> *ibid* 76-77

<sup>3</sup> Joseph C Hutcheson, Jr, ‘The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision’ (1929) 14 Cornell L Rev 274, 285.

the case, but rather the arbitrators' own expected "utility" – what best satisfies their own needs, wants, desires, and aspirations. Arbitrators, like everyone else, are maximisers of their own utility. The pursuit of that maximisation influences how they decide cases. The components of their utility are determinants of their behaviour.

No doubt, Leiter's perceived fairness on the facts is one component of that utility. But there are others. Put differently, the so-called "moral reason-for-action" (a reason focused on advancing other people's interests) that makes an arbitrator care for the human context of a case is just one of her reasons-for-action. "Prudential reasons-for-action" (reasons focused on advancing one's own interests) are also inevitably present.<sup>4</sup> This is not a point of reproach, merely a recognition of human realism. To be sure, what determines, what *really* determines arbitrator behaviour is much more complex than just the law and what would be fair on the facts of the case at hand. That, in essence, is what the metaphor of the arbitrator's breakfast refers to. And that is what we examine in this essay.

Our hope is that we will come to better understand arbitrator behaviour, and thus arbitration itself, by considering certain salient incentives and constraints that the current socio-legal system of arbitration places on arbitrators. This type of ambition is not new. Many similar forays have been made, notably from the law and economics camp, into the territory of judicial behaviour.<sup>5</sup> What determines the behaviour of judges? What do they seek to maximise? What incentives do they follow? How do these incentives differ from the average practicing lawyer? These are the sorts of questions that have been asked in these studies.

How do these questions play out in relation to arbitrators? That is the question we want to answer in this essay. And we, too, draw on law and economics methods, though rather lightly, as a conditionally useful set of instruments, not as a school of thought. The explanandum, here, is not the full variegatedness of the components of an arbitrator's utility – the full set of incentives and constraints that amount to determinants of arbitrator behaviour. We rather focus on a laconically selective array of incentives and constraints, principally those that are usually shrouded in conventional wisdom.

Why do this? It is not done for the purposes of an evaluative investigation eventually aimed at what Pierre Schlag calls "norm-selection" or "norm-advocacy":<sup>6</sup> we do not seek to say that the law, any law, should be interpreted or crafted in a certain way. It is not, then, the habitual juridical project of academic articles in law that is pursued here.<sup>7</sup> The purpose of the current essay is primarily to better understand

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<sup>4</sup> Matthew H. Kramer, 'On the Moral Status of the Rule of Law' (2003) 63 Cambridge LJ 65, 66: "Somebody's prudential reasons-for-action are focused exclusively or primarily on his own interests and only derivatively if at all on the interests of other people. Somebody's moral reasons-for-action are focused exclusively or primarily on other people's interests and only derivatively if at all on his own interests (apart from interests, such as a concern for acting in a morally proper fashion, which are themselves defined by reference to the well-being of other people).

<sup>5</sup> See for instance Richard A. Posner, 'The Role of the Judge in the Twenty-First Century' (2006) 86 B U L Rev 1049; Richard A. Posner, 'Judicial Behavior and Performance: An Economic Approach' (2004-05) 32 Fla St U L Rev 1259; Gordon R. Foxall, 'What Judges Maximize: Toward an Economic Psychology of the Judicial Utility Function' (2004) 25 Liverpool L Rev 177; Richard A. Posner, *Overcoming Law* (HUP 1995) 109-44; Richard A. Posner, 'What Do Judges and Justices Maximize (The Same Thing Everybody Else Does)' (1993) 3 Sup Ct Econ Rev 1; Richard S. Higgins and Paul H. Rubin, 'Judicial Discretion' (1980) 9 J Legal Stud 129.

<sup>6</sup> Pierre Schlag, 'A Comment on Thomas Schultz's Editorial' (2014) 5 Jnl of Int Dispute Settlement 235.

<sup>7</sup> Pierre Schlag, 'The Faculty Workshop' (2012) 60 Buff L Rev 807.

arbitration, to be a piece in the realm of “thinking about law” as opposed to “doing law”.<sup>8</sup>

Yet the practice of law is not spared. Not quite. The practice of arbitration law is, inevitably, informed by the parties’ understanding of arbitration. Altering the understanding of the determinants of arbitrator behaviour likely changes – and hopefully improves – the way counsel approaches a case. The purpose of counsel, after all, is to be yet another determinant that contributes to orienting what arbitrators do: if counsel believe they only play against the law and the facts, they might well be playing a different game than they think – or at least under a different set of rules.

But what does it mean, exactly, to talk about determinants of arbitrator behaviour? Let us see first how this works for judges. As Richard Posner puts it, most people tend to maximise a combination of “income, leisure, family relationships, work satisfaction, [a sense of] personal integrity, reputation, and felt achievement.”<sup>9</sup> The combination varies from one person to another, as some people weight certain elements more than other people do. Clearly, some people value income more than felt achievements; others accord more importance to reputation than personal integrity; yet others hold family relationships more dearly, or less, than the pleasure derived from doing a good job.

Judges, Posner maintains, tend to maximise a specific combination of these objectives. These objectives thus become determinants of the behaviour of judges – of judges taken as an abstract, generalised ideal-type. For instance, people who become judges tend to favour public recognition and leisure more than the average practicing lawyer does.

If we know that, we know what sort of people tend to become judges, how judges tend to behave once they are appointed, how they tend to make decisions. We can then better understand the functioning of the judiciary as a socio-legal institution. This allows us to see more clearly into how judges make law, and thus what the law likely is or will be in a particular jurisdiction. And again, as we said above, understanding this helps counsel make their case in court.

The same reasoning applies to arbitration: Arbitrators tend to maximise a specific combination of the objectives mentioned above, and of certain others. The way arbitrators respond to incentives and constraints, and the identity of these incentives and constraints, form the determinants of their behaviour. Seeing these determinants helps us understand the functioning of arbitration as a socio-legal institution, including the decisions and norms it produces.

Consider a quick example: in investment arbitration, it is beyond cavil that arbitrators make law, and that they do so to a significant degree.<sup>10</sup> This is not necessarily a good thing (in the relative sense that less might be better than more, as it barely is a credible proposition to maintain that arbitrators should not make law at all). It is not necessarily a good thing because more law is not necessarily better than less.<sup>11</sup> Now, whether it actually is a good thing, or is likely to be so, depends in part on whether arbitrators are appropriate

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<sup>8</sup> Thomas Schultz, ‘Doing Law and Thinking about Law’ (2012) 3 *Jnl of Int Dispute Settlement* 217.

<sup>9</sup> Posner, *Judicial Behaviour*, 1260

<sup>10</sup> There are many examples here. Consider for instance Alec Stone Sweet and Giacinto della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez’ (2014) *NYU J Int’L L & Pol*, forthcoming.

<sup>11</sup> Thomas Schultz, ‘Against Consistency in Investment Arbitration’ in Z Douglas, P Pauwelyn, and JE Viñuales (eds), *The Foundations of International Investment Law* (OUP 2014) 297.

people for lawmaking in the particular context. That, in turn, depends in part on the determinants of their behaviour.

In the discussion that will follow, our arguments are not grounded in scientifically measured evidence, but proceed from a humanistic affinity, relying on commonsensical, necessarily subjective insights. We do not invoke armchair confidence in the correctness of our view. We merely submit that the plausibility of our view is more than occasional, and that systematic empirical studies would be welcome in the places we mark.

The essay follows a simple path: it mirrors the main steps taken by classical law and economics studies on judicial behaviour. It takes the main types of incentives and constraints identified in these studies and applies them to the behaviour of arbitrators.

### **Income**

With regard to judges (more precisely US federal judges, and the point can only be transposed with care to other judges), Richard Posner has this to say: he “can be lazy, lack ... temperament, ..., berate without reason the lawyers who appear before him, be reprimanded for ethical lapses, verge on or even slide into senility, ..., hold under advisement for years cases that could be decided perfectly well in days or weeks, leak confidential information to the press, pursue a nakedly political agenda ...; he will retain his office.”<sup>12</sup>

Now, is it any different for arbitrators? To what extent can the behaviour of arbitrators, and more specifically their decisions, influence their income, their keeping their job?

One of the points of providing judges with such extraordinary tenure was to avoid that they respond to market forces, to economic incentives: their decisions should have no or little effect on their income. The rules governing compensation and terms and conditions of judicial employment usually take away financial “carrots and sticks”.<sup>13</sup> Judges are typically paid a set salary which cannot be lowered. Once appointed it is difficult to remove them. Most judges are only allowed to work as judges and do not have to source work: cases are supplied through the operation of the state judicial system.

This objective is, precisely, not replicated in the nature of the office of an arbitrator. Arbitration is strongly regulated by market forces. Robert Cooter, one of the torchbearers of the law and economics movement, made the obvious point in an early paper on private judges: arbitrators, he said, are subject to the same “market pressures as anyone who sells a service”.<sup>14</sup> Arbitrators are private actors who perform their function for private gain.<sup>15</sup> To do that, they must attract business.<sup>16</sup> Again: whereas judges can exert only limited influence on their income through their decisions in court, arbitrators, on the other hand, are likely to be able to influence their market value, and thus their income, through their decisions.

So what sorts of decisions increase the market value and income of arbitrators?

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<sup>12</sup> Posner, *What Do Judges*, 4-5

<sup>13</sup> *ibid* 2.

<sup>14</sup> Robert D. Cooter, ‘The Objectives of Private and Public Judges’ (1983) 41 *Public Choice* 107, 107.

<sup>15</sup> Andrew T. Guzman, ‘Arbitrator Liability: Reconciling Arbitration and Mandatory Rules’ (2000) 49 *Duke LJ* 1279, 1302-3.

<sup>16</sup> Christopher R. Drahozal, ‘Privatizing Civil Justice: Commercial Arbitration and the Civil Justice System’ (1999-2000) 9 *Kan JL & Pub Pol’y* 578, 588.

Intuitively, one may think that good decisions on the merits do precisely that, and that they do so rather significantly. Do we not want, as arbitrators, great lawyers who make great legal decisions, who render great awards on the merits? Cooter certainly thought so: for an arbitrator to maximise demand for his services, he must – and Cooter thought this was an “obvious” point on which to build – “acquire a reputation for deciding cases on the merits”, and for being particularly good at it.<sup>17</sup> This led Cooter to believe that a good economic strategy for an arbitrator is to “pick a speciality and acquire skill at interpreting that particular body of law”: an arbitrator should focus on making great awards, on the merits, in this particular area of law because she is particularly proficient in this area of the law.<sup>18</sup> A line of thought quite able to hold water.

And yet... does that really happen? Does the market want, as arbitrators, great lawyers who make great legal decisions, great awards on the merits? How can we know?

One way to form a hunch might be this: one would expect, in a market where there is considerably more supply, or offers, than demand, that conspicuous failures in providing a service would lead to a fairly quick and strong reaction of the market in moving to other offers. In commercial arbitration, the market remains mostly unaware of any such failure because awards are generally not published and therefore are not subject to independent scrutiny. But in investment arbitration, awards are routinely published and dissected *ad nauseam* by a variety of actors in the arbitration market. Accordingly, in this market, there would seem to be no reason why unfortunate substantive decision-making should not lead to an immediate market reaction, possibly commensurate to the unfortunateness of the decision.

Now consider that even an author as considerate and balanced as Federico Ortino identifies a number of arbitral decisions as “egregious failures”, produced by legal reasoning on the part of the arbitrators that is “manifestly contradictory, inconsistent or practically non-existent”.<sup>19</sup> Yet the relevant arbitrators seem to have faced no immediate and commensurate decrease in their appointments, even after having thus been thus hauled over the coals. And investment arbitration is often considered to be a luxury class of arbitration – one of its more demanding, high-profile, high-value varieties.

All in all, it is surprisingly difficult to find empirical evidence positively associating a lack of substantive decision-making proficiency, as elucidated through scholarly commentary on its manifestations, with a decrease in the apparent market value of the relevant arbitrators.

But should that difficulty really be surprising?

William Park makes the obvious point in a forthcoming article: “Publicly, lawyers talk about the proverbial good arbitrator who will be honest and intelligent. Yet in evaluating candidates to sit in their own cases, they doubtlessly hope for someone well-disposed to their arguments.”<sup>20</sup> Put bluntly, there is no such thing as an unproficient arbitrator who sees the dispute the way you, the party, see it. What is wrong with a

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<sup>17</sup> Cooter, Objectives, 109-10.

<sup>18</sup> *ibid.*

<sup>19</sup> Federico Ortino, ‘Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures’ (2012) 3 *Jnl of Int Dispute Settlement* 31, 31.

<sup>20</sup> William W. Park, ‘A Fair Fight: Lawyer Conduct and Level Playing Fields in Arbitration’ (2014) 30 *Arb Int*, forthcoming, p 6 of manuscript.

foolhardy decision that lets you win the case (assuming it does not raise grounds for annulment)?

Park takes the argument to its inevitable next step: “one might ask why it matters that the arbitrator be relatively free from bias”.<sup>21</sup> Park’s question, though, is not entirely as rhetorical as the context of its quote here might suggest: it is often not quite so easy to gauge how the arbitrator sees the dispute before she is appointed.

Sergio Puig looks at the question from a different angle, leading him to a yet more radical view. In a forthcoming study using an empirical method called ‘network analysis’, he suggests this: the overwhelming trigger for appointments in investment arbitration is the arbitrators’ social capital (the preferential treatment accorded between members of a group or, brutally put, who they know) combined with market collusion (keeping new entrants at arm’s length to reduce competition on the supply side).<sup>22</sup> The trigger is neither proficiency in legal interpretation, nor sensitivity for the fairness of the facts of the case.

And the situation is self-reinforcing: because of the importance of social capital, even when proficiency in legal interpretation and sensitivity for fairness obtain to a great degree, they are “dampen[ed by] conformity pressures”.<sup>23</sup> This means that conformity pressures displace, constrain and possibly override proficiency and sensitivity, making them less consequential in the decision-making process and thus yet less germane to the selection of the arbitrator.

In an earlier study on commercial arbitration, we found that neither specialisation of an arbitrator in the substantive area of law relevant to the dispute, nor an arbitrator’s past decisions are primary factors in the selection of arbitrators. Participants in commercial arbitration, our findings suggested, seem to be primarily looking for dispute resolution *managers*.<sup>24</sup>

In other words, it may be (and hedging is appropriate, as more dedicated empirical investigation would be welcome on this point) that there is little noticeable economic incentive for arbitrators to produce good decisions on the merits. Or put with yet more caution: this incentive seems significantly less strong than popular lore has it.

There is, however, one way in which decisions on the merits (though this does not only relate to merits) are likely to connect to appointments. It is more precisely a question of reasoning than one of outcome. The point is this: given the importance of social capital underscored by Puig, it would seem plausible that following arbitral precedents positively contributes to getting appointments. Indeed, who does not like to see one’s decisions endorsed by other tribunals? Following precedents nurtures social relations and thus creates social capital. Hence, it is economically sensible for arbitrators to follow prior cases decided by arbitrators most likely to influence future appointments: decisions of individuals often selected as co-arbitrators, for instance, become particularly worthy of attention.

The economic value, for arbitrators, of their decisions on procedural questions is a different matter.

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<sup>21</sup> *ibid.*

<sup>22</sup> Sergio Puig, ‘Social Capital in the Arbitration Market’ (2014) 25 EJIL, forthcoming.

<sup>23</sup> *ibid* p 3 of manuscript. As Puig explains, this is not unique to investment arbitration, and is in fact fairly frequent in institutions that contribute to global governance, as argued by David Kennedy, ‘Challenging Expert Rule: The Politics of Global Governance’ (2005) 27 Sydney L Rev 18.

<sup>24</sup> Thomas Schultz and Robert Kovacs, ‘The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay and Garth’ (2012) 28 Arb Int 161.

For instance, in our earlier study already mentioned, we found that specialisation in the law and practice of arbitration and management abilities were the two most significant factors for the selection of arbitrators. Both factors relate to decisions on procedural questions. As we just said: parties, counsel and arbitrators, when choosing other arbitrators, seem to place a great deal of importance on managerial skills. They appear to want dispute resolution managers who do not mess up the procedure. People who do not allow the arbitration to get derailed. People who make good procedural decisions.

Notice also that it is comparatively easier to discriminate between derailed and non-derailed arbitrations, than to discriminate between substantively good and bad arbitration outcomes. Put differently, it is generally easier to assess the quality of procedural decisions than to assess the quality of substantive decisions. This comparative ease in turn facilitates the diffusion of information regarding the decisions. (In the proverbial locker rooms of the local tennis club, one is more likely to hear statements to the effect that X messed up the procedure again, than judgments on Y's decision on the merits.) The effects of confidentiality in arbitration are here attenuated: it is less difficult for the market to ascertain the value of arbitrators in regard to their procedural abilities, than in regard to their ability to apply substantive law to the essential facts of the case.

In addition, there is typically far less room for antinomy between procedural regularity and conformity pressures than between a substantive decision on the merits and conformity pressures. Put bluntly, conformity pressures are much less likely to get in the way of good, managerially sound, efficient procedural decisions. Hence, Puig's point mentioned above about the "tweaking effects" of conformity pressures remains compatible with the argument that the variegated procedural decisions made by arbitrators have direct, "un-tweaked" market value and can as such influence arbitrator's income.

Now consider two ways in which procedural decisions can increase the income of arbitrators. The first way is to increase the chance of the arbitrator in question to get a slice, or a bigger slice, of the existing pie. This amounts to competitively improving the offer while demand stays constant. The second way is to increase the size of the pie itself. This means increasing demand. The first way has been the object of our attention thus far: increasing one's proficiency in running clean, efficient arbitrations is a way to competitively improve one's offer of arbitration services. But it does not increase, at least not directly, the demand for arbitration.

To the second way: increasing the demand for arbitration. This can for instance be achieved by allowing entire new breeds of cases to go to arbitration, by making it easier for certain types of disputes, or indeed for all types of disputes, to go to arbitration. This, in turn, can for example be attained by taking the edge off jurisdictional or admissibility requirements.

A modicum of knowledge of the recent history of investment arbitration, for instance, is enough to recollect decisions on jurisdiction that were, from a black-letter law perspective... interesting (think of small bondholders, or of MFN clauses), but that were in any event good for arbitrators' business. From a law and economics perspective, relaxing jurisdictional and admissibility requirements is, in most situations, a very sensible thing to do for arbitrators.

The resulting situation might be unfortunate for certain parties (consider, for instance, the



measurable harm in investment flows caused to states by letting investment arbitrations pass the jurisdictional phase even when they have no case on the merits).<sup>25</sup> But it is good for arbitration business. So if this is to be changed, some market intervention might be required: this means to alter the sundry incentives and constraints that the current socio-legal system of investment arbitration places on arbitrators.

Increasing income has its limits. From a perspective that isolates income, and discounts other objectives, the optimal number of cases an arbitrator should take on depends on the relationship between: on the one hand, the marginal income generated by a case; on the other, the expected loss of future cases due to a loss in reputation caused by a decreased quality of (particularly procedural, it seems) decision-making.

Here it bears noting that, much against conventional wisdom, it appears that the world of arbitration is barely opposed, in practice, to arbitrators delegating work. In our earlier study already quoted, we found indeed that two thirds of interviewees (arbitrators and lawyers practicing in arbitration) did not mind an arbitrator delegating his preparation for hearings, issuing procedural orders and even writing the award. This, of course, significantly displaces the constraints created by physical limits and must move upwards the optimum number of cases mentioned above.

Our argument so far has followed a simple path: we have focused on the economic incentives implied by arbitrators seeking to be “picked and picked again”, as Christopher Drahozal puts it.<sup>26</sup> But there is a major side road off this path: for many arbitrators, being picked does not create the greatest economic incentive.

Most arbitrators have other sources of income, typically legal counsel work, which usually are more lucrative, both in total and for equal time and effort. For such arbitrators, which likely form the great majority of arbitrators, it makes no economic sense to engage in certain behaviour (typically making certain decisions) that increases their chance of being picked but reduces their chance of being used as counsel. If potential future clients represent a dominant share of an arbitrator’s long-term income – an income greater than the income generated by appointments – then it is in most cases economically sensible to privilege these clients’ interests over those of the parties to the case. This, however, assumes that these interests are antagonistic, which is not necessarily the case.

These are some of the salient ways in which the maximisation of income – a routine business objective, we are not being judgmental here – connects to the behaviour of arbitrators. There is, however, one narrative about economic incentives that tells an implausible story. Admittedly, it is a dead horse, but it requires flogging to ensure it stays dead. It is the argument that arbitrators should, from an economic viewpoint, split the baby. Recall the argument: in order to maximise their income, arbitrators should make decisions that are pairwise efficient for the plaintiff and the defendant. To do that they should divide the stakes so as to keep both parties happy, or in other words “split-the-baby” with regard to awarding damages sought. This is meant to increase their chances of being reappointed by either party in the future.<sup>27</sup> This is a

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<sup>25</sup> Todd Allee and Clint Peinhardt, ‘Contingent Credibility: The Reputational Effects of Investment Treaty Disputes on Foreign Direct Investment’ (2011) 65 International Organization 401.

<sup>26</sup> Drahozal, *Privatizing Civil Justice*, 588.

<sup>27</sup> Drahozal, *Privatizing Civil Justice*, 588; Cooter, *Objectives*, 125.

dead horse because empirical investigations have shown that arbitrators do not in fact do this, or only marginally.<sup>28</sup>

To be sure, there could be other incentives and constraints that systematically offset this particular incentive, thwarting its empirical manifestations. But the more plausible explanation is that parties tend to over-evaluate their chances of winning the case. Hence, if the expectation is to get half the baby, it is lower than what they would expect to obtain from an arbitrator who, in their view, competently applies law to facts (not to speak of an arbitrator who sees the dispute their way), since on average each party believes that they have more than 50% chances of winning.

On our way to discussing reputation, which forms the substance of the next section, we should pause to consider an important distinction. Certain forms of reputation are purely instrumental: they only serve to achieve other objectives, typically, but not necessarily, the maximisation of income. These forms of reputation may, but also may not, be perceived as positive, or appealing, by the average participant in the system: one may not wish to have a certain reputation *per se*, but it serves an ulterior purpose. For these forms of reputation, we may use the word ‘publicity’. Now let us ask the customary marketing question about publicity: is there such a thing as bad publicity for an arbitrator or is there only publicity?

We delineated above a few ways in which it makes economic sense for an arbitrator to be known. Then again, even many bad decisions, on the merits or the procedure, are in fact good for someone. Derailing an arbitration may actually be what the respondent wants. Abilities to massage the law until it relaxes may be prized. Being open to bribes cannot fail to effectively seduce certain parties.

What is certain is that someone who is not known at all is very unlikely to be suggested, and thus appointed, as an arbitrator. Is it not so, then, that what counts above all is to be on the map? That there are economic reasons to prefer being a generally unpalatable somebody than a generally palatable nobody?

Let us not, of course, deform the argument to the point of making it inane: there are many characteristics for which an arbitrator may be known that are not appealing to anyone and serve no ulterior purpose. But the point we tried to develop is that the pool of these characteristics is much smaller than conventional wisdom has it. And that pool is likely to be even smaller when the arbitrator’s primary economic objective is to source clients for his counsel work: certain arbitrations are great platforms for publicity. In sum, being famous, even if only for being famous, has economic value, and thus creates economic incentives to strive for it.

### **Reputation, fame and prestige**

But money is not everything in life. In fact, as we said, being an arbitrator is not even the highest paying activity for many practising lawyers. So if someone chooses to become an arbitrator, it is either because he cannot enter one of the higher paying activities or because she does not want to. (Let us leave aside, here, the hypothetical already chalked out above, in which someone becomes an arbitrator only for instrumental reasons, for instance using the publicity that being an investment arbitrator generates in order to obtain

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<sup>28</sup> Bruce L. Benson, ‘Arbitration’ in Boudewijn Bouckaert and Gerrit de Geest (eds), *Encyclopedia of Law and Economics* (Elgar 2000) 159, 181-2.

income from other sources, through counsel work or academic appointments or anything else.)

In the latter case, when someone chooses to become an arbitrator because she prefers it to other more lucrative activities within reach, and assuming there is no problem of information asymmetry, we may assume the following: that person derives more satisfaction from the pursuit or realisation of other objectives than he loses in satisfaction from the loss in income.

There is nothing surprising here. There are vastly more credible situations in which people care about their reputation for reasons that are existentially independent on their instrumentality in generating income, thus granting reputation independent value, than credible situations in which people simply do not care about their reputation. In plain English: for most people, maintaining a positive reputation is an objective in itself, independently of its usefulness in generating income.

The same point has been made with regard to judges. We already mentioned in the introduction that economic analyses of the judiciary suggest that judges tend to care more about reputation than the average practising lawyer.<sup>29</sup> More precisely, they entertain a different ratio of the value they accord to reputation to the value they accord to income. Posner finds support for this view in the fact that many judges are sensitive to statistics even if they have no tangible effect on their career.<sup>30</sup> Who, indeed, is entirely insensitive to peer recognition?<sup>31</sup>

Now, what is the extent of an arbitrator's reputation?

Let us linger just a bit longer on judges to make the case for arbitrators. Some judges, clearly, acquire a reputation that amounts to fame. Importantly, though that much should be obvious, we are addressing ourselves here to positive reputation that amounts to fame, not just on any form of publicity as we contemplated above. So, Posner, a judge himself, considers that for some judges fame is in fact an important objective when conducting judicial behaviour.<sup>32</sup>

What about arbitrators? Do some of them acquire a level of reputation that amounts to fame, in the sense we understand it here? The answer depends of course on how high we place the bar on reputation before it becomes fame. And it depends on the community we consider.

The best-known arbitrators are clearly known to other arbitrators and to people acting as counsel in arbitration. So much would be true in mostly every professional community. But in many cases, their fame extends beyond these circles, in the first place to people who would like to join these circles: typically practicing lawyers and law students who want to work in the field of arbitration and therefore have to acquaint themselves with the social mechanics in that field.

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<sup>29</sup> Posner, *Judicial Behaviour*. Note that becoming a judge, at least in most national courts, excludes other sources of revenue, while being an arbitrator does so only to the degree that the same time and energy cannot be used for other remunerative activities. Let us put this differently: a difference between choosing to work as an arbitrator and choosing to become a judge in a state court is that the decision to become a judge typically excludes all other forms of work, whereas one can work as an arbitrator while still maintaining a professional practice as legal counsel, or in any other vocation. The economic cost, then, of choosing to work as an arbitrator is significantly less than the cost of choosing to become a judge.

<sup>30</sup> Posner, *Judicial Behavior*, 1271.

<sup>31</sup> Arguably, this behaviour of judges is in fact best explained as an indirect, fairly unconscious way to measure the implicit demand for their services, as Cooter maintains (Cooter, *Objectives*, 107). It would thus be a way to measure their economic value for society. Yet it is not a direct economic, income-maximising incentive.

<sup>32</sup> Posner, *Role of the Judge*, 1056.

Arbitrators may also be famous in communities that are interested in the effects of their work: for example, international organisations, NGOs, academics beyond the field of law, and even journalists often are interested in the contributions of investment arbitrators to investment law, to general international law, to the economics of foreign investments, to the international political economy of foreign investments, and so on.

But we said above that we are considering here positive reputation that amounts to fame: so are these contributions necessarily, or even just mostly, positive? Let us briefly park the question, and return to it after we have entered a quick clarification.

We should make it plain that we are moving here to a specific form of reputation: prestige, which in the context we discuss is the type of instantaneous reputation that attaches to an individual merely because she serves as an arbitrator, regardless how that activity is actually performed by the individual in question. Prestige, again, is a positive type of reputation, which entails respect and admiration. So the question here is: do respect and admiration attach to the function of an arbitrator?

From a 30'000 foot view, there is something inherently prestigious in every dispute resolution function. This is in fact often taken as a given in behavioural economic work on the judiciary.<sup>33</sup> Granted, it seems commonsensical that one of the motivating factors for becoming a judge in a state court is the prestige that is associated with the position. Holding a position as a judge does indeed confer a certain level of respect and prestige and social standing in many societies. These are caused by the community's recognition that this individual exhibits the requisite symbolic capital to exert a function that has significant socio-legal consequences for individual parties and, in the aggregate, for the community as a whole. Likewise, there is something inherently respectable in being chosen by members of the international commercial community to decide their disputes.

But let us start the descent from our 30'000 foot view. Consider the prestige that comes with being associated to a certain group of people, or more specifically to certain Weberian ideal-types, in our case ideal-type arbitrators. Recall that the so-called "first generation" of arbitration, in the 1970ies, were cast by Yves Dezalay and Bryant Garth as "Grand Old Men".<sup>34</sup> Such individuals were chosen because of their personal prestige acquired before becoming an arbitrator. They brought that prestige to the collective representation of what it is to be an arbitrator. To put it simply, who would not want to be associated with a group of Grand Old Men (assuming you are a man, that is)?

The second generation of arbitrators, in the 1990ies, was cast as "Technocrats". These were acrobats, if you will, of arbitration law and procedure, highly specialised experts in the technical intricacies of

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<sup>33</sup> Linz Audain, 'The Economics of Law-Related Labor V: Judicial Careers, Judicial Selection, and an Agency Cost Model of the Judicial Function' (1992-93) 42 Am U L Rev 115, 120-21 ("Because prestige, power and high incomes are commonly available amenities for partners in large law firms and because those partners are willing to take substantial reductions in income to become judges, it follows that the judiciary confers more prestige (and power) on these individuals than is available to them in the law firm context."); Cooter, Objectives, 129 ("In the absence of a compelling alternative, a reasonable hypothesis is that self-interests judges seek prestige.").

<sup>34</sup> Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (U Chicago Press 1996) 21.

arbitration. Garth and Dezalay considered this to be still “rather glamorous”.<sup>35</sup>

How about today? If our prior study, which we keep referring to, holds true in that the current generation of arbitrators is best described as “Dispute Resolution Managers”, the question becomes: how much glamour, inherent respect and admiration do managers typically get? Does it differ, to take extremes, from the prestige of being a Grand Old Man (or Woman)? The question probably does not need to be answered. All of this is very much simplified, of course, as the very nature of ideal-types is to be analytical constructs, but the point remains: the greatness thrust on individuals (to use of bit of Shakespeare terminology) by virtue of being an arbitrator may well be quite different today than it was 40 years ago.

Let us consider investment arbitration again. To be sure, investment arbitration has conspicuously altered the relation between arbitrators and reputation and fame. For a long time, the majority of people who know about arbitration would look up to arbitrators; admire them, merely because they were arbitrators. The rise of investment arbitration gave arbitrators an extraordinary platform for publicity. Notice how the website of ICSID, where it lists current and past arbitrations, is used as a Who’s Who in arbitration.

Today, indeed, even the layperson can very easily find out who arbitrates disputes between household name companies and states. And notice how investment arbitrators decide, again very often in cases in which the arbitrators’ identity is public and publicised, matters of great import: the financial stakes are often high, and so are sometimes the social, environmental, and public health stakes.

This is a double-edged sword. As the world at-large came to realise that certain effects of investment arbitration can be devastating, the notorious backlash against investment arbitration developed and grew.<sup>36</sup> The very word ‘backlash’ is probably suggestive enough to point out the changing social view of arbitration.

Here we must return to a distinction we sketched above between two different communities, or constituencies, that arbitrators appeal to: on the one hand, arbitration practitioners and would-be arbitration practitioners; on the other, the public at large that looks at arbitration. These are two different groups of people in which arbitrators build the sort of reputation and fame we are discussing here, which has value independently of its ability to generate income.

The first constituency, clearly, is narrower than the second. It is composed essentially of lawyers – law practitioners, law students, even academic lawyers. In this group, to put it bluntly, there is no backlash. Backlash stories are simply misunderstandings of arbitration (a textbook case of Bourdieusian symbolic violence if there ever was one). In this group, one may be (or, more precisely, one may carefully build a reputation for being) investor friendly, or well disposed to state public interest, or a neutral player, but one is not against the system itself of arbitration. In this group, the metier of arbitrator is still a high achievement.

But, arguably, the perceived identity of arbitrators is no longer so exclusively shaped by this natural habitat. The perception of outsiders starts to matter: the perception of this second community we flagged, the public at large, which is becoming a constituency. Notice, for instance, the unnecessary force with which

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<sup>35</sup> *ibid* 8.

<sup>36</sup> See for instance Osgoode Public Statement on the International Investment Regime, 31 August 2010, Art. 14: states “should take steps to replace or curtail the use of investment treaty arbitration; and should strengthen their domestic justice system for the benefit of all citizens and communities, including investors.” See also Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung and Claire Balchin (eds), *The Backlash Against Investment Arbitration* (Kluwer 2010).

arbitrators and would-be arbitrators have reacted to reports of campaign groups, empirical studies of political scientists, and stories of journalists. They could just have been oblivious to all this. Instead, they seemed to react to something that went through to their perceived identity. The constituencies of an arbitrator's reputation are expanding.

Let us not kid ourselves: investment arbitration (and arbitration in general is all too easily assimilated to it) is despised in many social circles.<sup>37</sup> There are areas in this world, social and geographic areas, where it is probably advisable not to say that one is an investment arbitrator, and stick to discussing the weather. Whether this disagreeableness is justified or not is irrelevant.<sup>38</sup> What is relevant is that it exists.

In certain situations it is understandable. Consider the following: imagine you have lost a family member, a friend, to lung cancer due to smoking; imagine an investment arbitral tribunal significantly stifles the efforts of one nation directly, and of several nations indirectly, to curb smoking; imagine you are aware of this and your daughter comes home one night saying she just became an investment arbitrator. Who would not have reservations in their pride?

Now, this is an extreme situation, of course. But the point is that resolving purely commercial disputes between commercial actors is incomparably less likely to elicit strong sentiments in those who watch, than “interfering” in agreeable social and health policies, with a sword used primarily to champion investor interests.

What does this mean? It means that the publicity arbitrators get from practicing their trade grows, but that the social reputation they acquire in doing so might – just might – be decreasing rather than increasing. It might be becoming less appealing, rather than more. Can it go so far that the reputation individuals acquire from being an arbitrator shifts from being a gain, a utility, to being a cost?

## **Doing justice**

Doing justice is often an objective for an individual in charge of resolving a dispute. An objective in the sense of something having inherent value if it is attained or approached, as opposed to something required by others. Doing justice is thus likely to figure, sometimes prominently, sometimes marginally, in the matrix of incentives that make dispute resolvers behave the way they do. But what does it mean to do justice? Can we at least rough out a typology of what this may mean for arbitrators?

Studies on judges provide, again, a useful starting point. Certain such studies accent the importance for judges of their power to promote their own conception of justice or political vision on society.<sup>39</sup> One of the reasons why lawyers seem to choose to become judges, in defiance of the economic disadvantages outlined above, is a desire to “change the world for the better”.<sup>40</sup>

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<sup>37</sup> See the classic *cri de coeur* by Pia Eberhardt and Cecilia Olivet, *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom* (Corporate Europe Observatory and Transnational Institute 2012).

<sup>38</sup> For a study that nibbles at the question, Thomas Schultz and Cédric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study’ (2014) 25 EJIL, forthcoming.

<sup>39</sup> Foxall, *What Judges Maximize*, 181.

<sup>40</sup> Posner, *Role of the Judge*, 1056.

Can this be transposed to arbitrators?

The classical argument one encounters when suggesting mostly anything of that kind is that the authority of arbitrators is derived from the agreement of the parties and as such the arbitrators' duty is to the parties and to the parties only. Arbitrators get their instructions from the parties, and if these instructions do not call for "justice," only for refereeing, then there shall be no pursuit of justice. (Let us, *ex hypothesi*, exclude refereeing from the realm of justice.)

Among black-letter lawyers, such arguments may do. But if we overcome our legal reflexes and consider even just a glimpse of the psychological and sociological aspects of human conduct, it seems fairly unlikely that this is a sufficiently elaborate explanation of the relation arbitrators entertain with justice.

To start with a simple point, many arbitrations are not only the parties' business. They are often also society's business. As William Park puts it: "The general community often has a stake not only in the outcome of arbitration, but also in the way proceedings have been conducted."<sup>41</sup> There is no need for advanced moral philosophy to suggest that arbitrators, as members of society, should not remain systematically impervious to externalities that may exist in connection with their cases. But more importantly, the point can also be made as a descriptive matter: arbitrators, at least sometimes, are indeed concerned by general ideals of justice that transcend the case at hand.

For instance, who has not heard investment arbitrators openly claim that the world needs a strong hand, that investment arbitration is to investment flows what the USA are to international security, that it gets rogue states to walk the straight and narrow? Or, on the other end of the spectrum, investment arbitrators expressing the belief that the priority in regulating the international economy, including through the arbitration of disputes, is to end poverty? These are not un-politicised views devoid of justice symbolism.<sup>42</sup>

Investment arbitration, you might say, is special. But even in commercial arbitration, for many arbitrators, a heightened sense of fairness in the way they handle a dispute seems to matter a great deal. Consider William Park, for instance, whose many writings insist on "the right way to do things" and on arbitration's role in the search for truth; and his many references, direct and indirect, to Christian morality.<sup>43</sup> Do they not point to something more profound than the need to comply with the applicable law or professional rules or codes of conduct?

A more classical example: the role of ideologies of justice in an arbitrator's home legal culture (for instance formalism vs. informalism, or legalism vs. confucianism) influence that arbitrator's belief about how often settlement is an appropriate outcome.<sup>44</sup> Justice, in other words, is done differently depending on one's home legal culture, and its attendant representations of the right ways to do justice.

Of course, disputation can be had endlessly about the appropriateness of all these variegated references for the pursuit of justice in arbitration. But that is not the point.

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<sup>41</sup> William W. Park, 'Arbitration in Autumn' (2011) 2 *Jnl of Int Dispute Settlement* 287, 304.

<sup>42</sup> For a philosophical, normative (not descriptive) account of this question, see Thomas Pogge, 'Editorial' (2014) 5 *Jnl of Int Dispute Settlement*, forthcoming.

<sup>43</sup> For instance William W. Park, 'Arbitrators and Accuracy' (2010) 1 *Jnl of Int Dispute Settlement* 25.

<sup>44</sup> See the classical work of Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decision-Making* (2nd edn, CUP 2005).

The point is that it is plausible that, on average, doing justice is a value that figures prominently enough in the decision-making matrix of the average arbitrator for it to be taken into account in the general analytical construct we are putting together here. So again the question: can we at least sketch a rough typology of what doing justice might mean for arbitrators? And sketch it in a way that allows us to think about how it may influence their decision-making?

One such typology could be this. Arbitrators, and mostly every other dispute resolver, have at least three broad ways to do justice:<sup>45</sup>

First, they can seek to maximise the cumulated satisfaction (subjective) or interests (objective) of the parties to the instant case. In other words, both parties should get the best possible deal out of the arbitration, even if it is only the best possible loss. A typical incarnation of this ideal is to disregard prior cases which offer themselves as possible precedents to follow. *Obiter dicta* are avoided. The focus is on the case, not on past or future cases.

Second, they can seek to further the rule of law, in the sense of aiming at the greatest possible predictability. Here the arbitrators reward the parties for the plans they have made and permit other, future parties to make meaningful plans. This may, but need not, lead to a decision in the arbitration that does not advance the current interests of the parties to the greatest extent possible. *Dura lex sed lex*. A typical incarnation of this ideal is to treat prior cases as precedents to the greatest reasonable degree.

Third, they can seek to further certain substantive societal values, such as, quite classically, the protection of the environment, human rights, the protection of property (including, perhaps, intellectual property) as a cornerstone of our economy, decreasing poverty as a cornerstone of global justice, etc. This may, but need not, lead to arbitral decisions that make neither of the parties particularly happy nor are particularly predictable, but may be good for the community at large. Under this conception of justice, prior cases, future cases, rules, and even the case at hand are all instruments – means but not ends – used by the arbitrators to achieve their societal goal.

In each case in which one of these pursuits is somewhat advanced, the arbitrator may reasonably derive some satisfaction, from having advanced a certain conception of justice, from having done justice. This may well have independent value for the arbitrator.

To be clear, seeking to maximise this value acts like a vector that reinforces, weakens or displaces the effects on the behaviour of arbitrators of other vectors such as the maximisation of income or reputation.

One concrete example might help: creating and following precedents. The classical economic theory on precedents, for instance, suggests that it makes little economic sense for arbitrators to relate one case to another: arbitrators are hired and paid by the parties to resolve the dispute between them, not to clarify the law or help future parties anticipate what will happen.<sup>46</sup> From this perspective, for an arbitrator to write an

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<sup>45</sup> Thomas Schultz, 'The Three Pursuits of Dispute Settlement' (2011) 1 Czech (& Central European) Yearbook of Arbitration 227.

<sup>46</sup> Robert D. Cooter and Daniel L. Rubinfeld, 'Economic Analysis of Legal Disputes and Their Resolution' (1989) 27 J Econ Lit 1067, 1093; Drahozal, Privatizing Civil Justice, 586; William M. Landes and Richard A. Posner, 'Adjudication as a Private Good' (1979) 8 J Legal Stud 235, 238, 245; Foxall, What Judges Maximize, 180. The little



*obiter dictum* amounts to working for free (or to bill the parties for something she was not required to do). Seeking to do justice, on the other hand, may create an incentive that is strong enough to alter the arbitrator's view in this regard.

### **Avoiding reprimand by an annulment or denial of enforcement**

And the law, the obdurate lawyer at the end of his tether may now cry out, this surely creates determinants of arbitrator behaviour too?

We entered the caveat in the introduction that we would not review the full scope of incentives and constraints that determine the behaviour of arbitrators, but rather focus on a selected few determinants. We certainly acknowledge the variegated effects of law's perceived authority (law being obeyed, and thus acting as a determinant, merely because it is "law"<sup>47</sup>) and we recognise the likely Bourdieusian habitus to use legal rules and "soft-law" rules as the first port call for arbitrators to orient themselves. Professional liability, to some degree, is also likely to come into the mix. A full map of the ways law acts as a determinant of arbitrator behaviour would need to elaborate on these points.

We want to focus on one thing in particular that assuredly directs the behaviour of arbitrators, and may well be one of the most important: the objective of avoiding the reprimand elicited by an annulment of the award or its unenforceability.

Only a brief discussion is warranted here, because the subject is fairly straightforward. To our usual point of departure: classical economic theory accents the importance for judges not to have their decisions overturned by superior courts.<sup>48</sup> Arbitrators have a similar worry – let us not fret here over the distinction between appeal (of judgments) and annulment (of arbitral awards), for this is a difference that makes no difference for the argument we want to make.

The point really is simple: arbitrators are almost inevitably in effect reprimanded when their awards are annulled, set aside or even, with many qualifications, denied enforcement. In ICSID arbitrations, ad hoc annulment committees often make a point of castigating the arbitral tribunal for what the committee sees as a reproachable lack of interpretive proficiency of the applicable legal provisions.

The question of course is not whether the reprimand is justified or not – certain annulments are barely disguised political actions, or deplorable manifestations of judicial incompetence. Essentially, barely anyone likes to see their work, in this case often months if not years of work, thrown to the winds, with accompanying implicit if not express scolding.

### **Conclusion**

The list could go on. The deference arbitrators receive during hearings is likely to have value for most

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economic sense that it does make comes from the fact that, under certain circumstances, an arbitrator's work may gain in efficiency by following precedents with little discussion.

<sup>47</sup> For a discussion of these effects, Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (OUP 2014), chapter 1 and 2.

<sup>48</sup> See for example, Andrew J. McClurg, 'The Rhetoric of Gun Control' (1992) 42 Am U L Rev 53, 62; see also Posner, What Do Judges, 14 (arguing that judges do not like to be reversed).

individuals, and is thus likely to attract people to the job of arbitrator and to guide their behaviour when on the job. Arbitrators can decide on the life and death of companies, and order forbidding dictators to pay up tens and hundreds of millions of dollars in compensation. This is real power, and deference tends to follow. Arbitrators may also find consumption value in hearing the case and making a decision, or casting a vote on its outcome. Arbitrating cases is more intellectually stimulating than many other areas of legal practice and business. Arbitrators may consume the arbitration as if a spectator at a play or theatre performance, or as a detective seeking to unravel mysteries. They may even find joy in keeping a poker face as the parties try to read their thoughts about the case they are pleading. And we should not forget the importance of mimetic desires: desires are borrowed from others, modelled on the desires of others, with whom one identifies and seeks to copy. The fulfilment of what was originally other people's desires has value for us and directs our behaviour. Certain people want to become arbitrators, and to behave in a certain way when being an arbitrator, because other people want it too. The greater the rivalry, the greater the value of the desired object. The greater the value of the object...

And the list could still go on. All of these objectives may act as determinants of arbitrator behaviour. Our endeavour was merely to point out certain salient features of the matrix of arbitrator decision-making. What the arbitrator had for breakfast will of course not feature prominently in this matrix – unless the breakfast was really quite peculiar.

Admittedly, it is clearly crucially important, in order to *do* arbitration, to conduct detailed analyses of the legal and quasi-legal rules governing arbitration. The customary black-letter law works on arbitration are, there, worthy of commendation. But such works – that skip breakfast, as it were – will take us only so far if we want to *think about* arbitration.

An approach grounded in legal realism and borrowing law and economics methods gets us one step further. It at least tells those who think that the behaviour of arbitrators is directed solely by a proficient interpretation of the applicable law, that they might want to think again.

And a final word to those who rely on the paradigm of arbitration being a strict legal-rational institution, an actor whose rationality only comprises legal commands:<sup>49</sup> we encounter too many anomalies that this paradigm cannot explain. They cannot be brushed away as acceptable levels of error. The paradigm has to change.

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<sup>49</sup> This paradigm is for instance occasionally used to deny the possibility that investment arbitration causes regulatory chill: see for example the discussion in Kyla Tienhaara, 'Regulatory chill and the threat of arbitration: A view from political science' in Chester Brown and Kate Miles (ed.), *Evolution in Investment Treaty Law and Arbitration* (CUP 2011).